

SUBMISSION OF THE UNITED STATES

The United States is pleased to make this submission on the protection of the rights of broadcasting and cablecasting organizations which includes suggestions for revision, questions and comments. We hope this submission and the forthcoming new (revised) non-paper stimulate further discussion and facilitate achieving a broader agreement on the objectives to be attained in order that the United States can join the consensus of Member States in supporting a Diplomatic Conference to be held in November 2007.

The United States reserves its right to raise additional issues and concerns on this proposed treaty in the future.

Draft Non-paper on the WIPO Treaty on the Protection of Broadcasting Organizations

*Draft 1.0
March 8, 2007*

Introductory Note

1. The work of the special session of the Standing Committee on Copyright and Related Rights (SCCR) from January 17 to 19, 2007, was based on the decision of the General Assembly of the World Intellectual Property Organization (WIPO) in its thirty-third session in 2006, which stated that:

“the sessions of the SCCR should aim to agree and finalize, on a signal-based approach, the objectives, specific scope and object of protection with a view to submitting to the Diplomatic Conference a revised basic proposal, which will amend the agreed relevant parts of the Revised Draft Basic Proposal (document SCCR/15/2). The Diplomatic Conference will be convened if such agreement is achieved.”

2. The Committee requested the Chair to prepare a new non-paper. To facilitate this process, the Chair, through the e-mail address <copyright.mail@wipo.int>, will invite the Coordinators of the Regional Groups, Member States, and the European Community, to submit their comments for developing the non-paper before its finalization. The focus of the non-paper will be on the provisions that are relevant in the light of the objectives, specific scope and object of protection of the treaty being under preparation. The new non-paper should be distributed by May 1, 2007.

Notes on the Draft

3. This draft non-paper has been prepared by the Chair maintaining the structure of document SCCR/15/2, and respecting both the proposals made earlier by Governments and groups of Governments, but at the same time recognizing the positions differing from these proposals, expressed later in the debates in the SCCR.

4. The draft non-paper endeavors to lend full recognition to the “signal-based” approach, and to the focus determined by the General Assembly and the SCCR.

5. What is now presented is a narrow model. It accommodates both those countries granting and wanting to grant (exclusive) rights to the beneficiaries of protection, and those that want to establish a narrower and specific protection against signal theft. If Member States so wish, a provision may be added allowing for optional wider protection, notably of post-fixation rights, which would enable international protection, linked to the flexible clause on national treatment and reciprocity regarding optional rights.

6. The following elaboration and drafting has the objective to achieve broader acceptance and to fulfill the focus set by the General Assembly and the SCCR:

- the signal-based approach covers the whole instrument through the definition of “broadcast”;
- the object of protection, the “broadcast,” is explicitly defined as the program-carrying signal; the denomination of that object, the “broadcast”, is maintained in this non-paper to secure coherence with the TRIPS Agreement and the Rome Convention; however, the terminology may still be reconsidered;
- the main objective against signal theft is determined in the new Article 1;
- the object of protection and the scope of application are determined in detail in new Articles 2 and 3;
- the Rome safeguards have been further developed;
- definitions are tailored for the more precise and narrow scope of application;
- the scope of protection is narrow;

- the treaty provides for minimum norms only (providing more protection than the treaty requires is allowed);
- the number of rights and protection clauses, and the amount of text, is reduced;
- an effective minimum is defined in the rights and protection clauses.

7. As there is no obligation to provide exclusive rights and as there is no obligation to provide any protection concerning post-fixation uses (except reproduction), it is far more clear that the implementation of the Treaty would in no instance affect public interest, access to information, consumer interests or technology innovation.

8. In this light, and in order to maintain the public interest safeguards contained in Articles 2 to 4 in document SCCR/15/2, these principles have been moved to the preamble, and adapted to fit the reduced text.

9. Provisions on limitations and exceptions are still maintained in the draft. With the reduced scope of the Treaty, perhaps even some of these provisions would become superfluous.

10. This model would allow conclusion of a treaty that could gain broad acceptance because it would leave room for the different approaches to rights and protections.

Round of Comments of this Draft Non-Paper

11. The deadline for comments on this draft is March 28, 2007. The draft exists only in English.

12. The non-paper will be finalized after the round of comments.

13. The “final” non-paper for the second special session of the SCCR will be issued in all working languages of WIPO on May 1, 2007.

WIPO Treaty on the Protection of Broadcasting Organizations

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Preamble

The Contracting Parties,

Desiring to develop and maintain the protection of the rights of broadcasting organizations in a manner as effective as possible,

Recognizing the need to update international rules in order to provide adequate solutions to the questions raised by economic, social, cultural and technological developments,

Recognizing the profound impact of the development and convergence of information and communication technologies which have given rise to increasing possibilities and opportunities for unauthorized use of broadcasts both within and across borders,

Recognizing the need to maintain a balance between the rights of broadcasting organizations and the interests of the general public and *noting* the value and importance of promoting access to knowledge and information and national educational and scientific objectives, curbing anti-competitive practices and promoting the public interest in sectors of vital importance to its socio-economic, scientific and technological development

United States Government Comment: *The United States Government suggests the foregoing change to reflect standard and customary preamble language and ensure consistency within this Treaty.*

Recognizing the importance of cultural diversity and the need to protect and promote cultural diversity,

United States Government Comment: *The United States Government suggests the foregoing change to reflect standard and customary preamble language and ensure consistency within this Treaty.*

Acknowledging the desirability of preventing the abuse of the protection granted under this Treaty or the recourse to practices which unreasonably restrain trade or adversely affect the international transfer of technology,

United States Government Comment: *The United States Government suggests the foregoing change to reflect standard and customary preamble language and ensure consistency within this Treaty.*

Recognizing the objective to establish an international system of protection of broadcasting organizations without compromising the rights of holders of copyright and related rights in works and other protected subject matter carried by broadcasts, as well as the right holders' ability to exploit those rights and the need for broadcasting organizations to acknowledge these rights,

Stressing the benefits to authors, performers and producers of phonograms of effective protection against illegal use of broadcasts,

Supprimé : that nothing in this Treaty shall limit the freedom of a Contracting Party to

Supprimé : e

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Supprimé : or to

Supprimé : taking any action it deems necessary to

Inséré : ing

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Supprimé : *Emphasizing* that this Treaty shall neither limit nor constrain the freedom of a Contracting Party to protect and promote cultural diversity; the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions provides a framework for those who are parties to it

Supprimé : , when applying this Treaty and specifying in, their legislation licensing practices or conditions, to

Inséré : ,

Have agreed as follows:

GENERAL PROVISIONS

Supprimé : ¶

_____ Saut de page _____

Article 1 *Objective*

The objective of this Treaty is to provide adequate and effective legal protection for broadcasting organizations against unauthorized use of their broadcasts.

Article 2 *Object of Protection*

- (1) The provisions of this Treaty shall apply to the protection of broadcasting organizations in respect of their broadcasts.
- (2) The provisions of this Treaty shall apply to the protection of cablecasting organizations in respect of their cablecasts in the same way as they apply to broadcasting organizations and broadcasts.
- (3) The provisions of this Treaty do not give rise to any rights in the programs that are transmitted by broadcasting organizations.

Article 3 *Scope of Application*

The provisions of this Treaty shall not provide any protection in respect of

- (i) mere retransmissions;
- (ii) any transmissions where the time of the transmission and the place of its reception may be individually chosen by members of the public (on-demand transmissions); or
- (iii) any transmissions over computer networks (transmissions using the Internet Protocol, “webcasting”, or “netcasting”).

United States Government Comment: The United States believes that Article 3(i) would be more appropriate under Article 6. From our understanding of the Chair’s intent, “mere retransmissions” would receive protection so that one could not transmit a mere retransmission without authorization, but the beneficiary of this protection would be the original broadcasting organization and not the mere retransmitting organization.

Article 4 *Relation to Other Conventions and Treaties*

- (1) Protection granted under this Treaty shall leave intact and shall in no way affect, limit or prejudice the protection of copyright or related rights in the programs incorporated in broadcasts. Consequently, no provision of this Treaty may be interpreted as prejudicing such protection.

(2) Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations done in Rome, October 26, 1961 (hereinafter the Rome Convention).

(3) Contracting Parties, who are Contracting States of the Rome Convention, will apply the provisions of the Rome Convention between themselves when that Convention provides for an obligation which is more extensive than the obligations of this Treaty.

~~(4) This Treaty shall not have any connection with, nor shall it prejudice any rights and obligations under, any other treaties.~~

Supprimé :

United States Government Comment: The United States Government suggests Article 4 include a non-derogation clause applicable to all treaties to which Contracting Parties belong.

Article 5 Definitions

United States Government Comment: The United States Government would like to suggest that the definition section be moved closer to the beginning of the document, given that terms used hereunder are referenced in Articles 2 and 3.

For the purposes of this Treaty:

(a) “broadcast” means an electronically generated signal transmitted by wireless means and carrying assembled and scheduled programs for the reception by the public,
- such signals transmitted by satellite are also “broadcasts”;
- such signals are also “broadcasts” when encrypted, if the means for decrypting are provided to the public by the broadcasting organization or with its consent;

Supprimé : general

United States Government Comment: The United States Government would like to note the importance of ensuring that only broadcasts to the public are protected under the definition of “broadcast” under Article 5(a) and that, therefore, any wireless transmission within a home or personal network is not considered a “broadcast” under this Treaty. We also have a concern about the meaning or affect of the addition of the word “general” before “public.” Does the term “general public” in the second line of Article 5(a) and under Article 5(c) mean something different than “public” in the final line of Article 5(a) or under Article 5(e)? Because of these concerns, we propose deletion of the word “general.” We would also like to confirm that the definition of “public” (and “general public” if this term is maintained) include broadcasts and cablecasts that are made on a point-to-multipoint basis to subscribers.

(b) “program” means live or recorded material consisting of images, sounds or both;

(c) “broadcasting organization” means the legal entity that takes the initiative and has the responsibility ~~or makes arrangements~~ for the transmission of a broadcast for the reception by the public;

Supprimé : general

United States Government Comment: The United States Government suggests the additional language to Article 5(c) in order that the Treaty take into account the real business models of broadcasting and cablecasting organizations. Without this language, those organizations

may be inadvertently excluded from the benefits of the protection of this Treaty because of the ways their signals are actually transmitted.

(d) “cablecast” means the same as “broadcast” but transmitted by wire and excluding transmission by satellite;

United States Government Comment: The United States Government would like to reiterate its concern about the meaning or affect of the addition of the word “general” before “public” under Article 5(a) in the definition of “broadcast.”

(e) “retransmission” means the simultaneous transmission for the reception by the public by any means of a broadcast by any other person than the original broadcasting organization; simultaneous transmission of a retransmission shall be understood as well to be a retransmission;

United States Government Comment: The United States Government notes the importance of ensuring that only retransmissions to the public are covered under the definition of “retransmission” under Article 5(e) and that, therefore, any transmission within a home or personal network is not considered a “retransmission” under this Treaty.

(f) “communication to the public” means making the programs carried by the broadcast perceptible to the public;

United States Government Comment: The United States Government believes this Treaty is designed to protect the signal, which is reflected in the definition of “broadcast” under Article 5(a), and not programs, which is the content of the signal and is protected by the WIPO Copyright Treaty or WIPO Performances and Phonograms Treaty, among other treaties.

(g) “fixation” means the initial embodiment of a broadcast [on a physical support] from which the programs carried by the broadcast can be perceived, reproduced or communicated through a device.

United States Government Comment: The General Assemblies mandated the Member States “to aim to agree and finalize on a signal-based approach.” Providing broadcast organizations with the exclusive right of fixation goes beyond the Member State agreed mandate of the General Assemblies. For this reason, the United States Government suggests deletion of Article 8(1)(ii) and therefore questions the need for the definition of “fixation” under Article 5(g). If fixations are to be protected under the Treaty, it must be clarified that the only fixations to be protected are the “initial” embodiments made by the broadcasting organization and not all fixations created whenever anyone records a signal in their home.

Article 6 Beneficiaries of Protection

(1) Contracting Parties shall accord the protection provided under this Treaty to broadcasting organizations that are nationals of other Contracting Parties.

(2) Nationals of other Contracting Parties shall be understood to be those broadcasting organizations that meet one of the following conditions:

(i) the headquarters of the broadcasting organization is situated in another Contracting Party, or

(ii) the broadcasts are transmitted from a transmitter situated in another Contracting Party. In the case of satellite broadcasts, the relevant place shall be the point at which, under the control and responsibility of the broadcasting organization, the program-carrying signals intended for direct reception by the public are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth.

United States Government Comment: We believe this new international framework should take into account current business practices that have developed between content owners and broadcasters. This Treaty should not affect or override contractual agreements that have been negotiated between content owners and broadcasters. For example, in the United States and perhaps elsewhere, sports industries have developed comprehensive agreements with broadcasters in which the sports league grants the broadcasting organization a right to broadcast its signal in a specific region. In such contracts, the sports league retains all other rights to the broadcasting organization's signal, including the right to license others to transmit and retransmit it on cable, satellite and the Internet as well as the right to fix and reproduce the signal. In addition, such contracts generally provide that the sports leagues, not the broadcasters, have the right to undertake and/or approve of enforcement actions against unauthorized users and uses. It is important to ensure that nothing in this Treaty will override or limit those provisions in existing or future contracts. Consideration should also be given to who should be the proper beneficiary of protection in such cases.

Article 7 National Treatment

Alternative J ("WPPT Model")

(1) Each Contracting Party shall accord to nationals of other Contracting Parties the treatment it accords to its own nationals with regard to the rights specifically granted and the protection provided for in this Treaty.

Alternative K ("Berne Model")

(1) Each Contracting Party shall accord to nationals of other Contracting Parties the rights that their respective laws do now or may hereafter grant to their nationals, in respect of broadcasts for which such nationals are protected under this Treaty, as well as the rights specifically granted and the protection provided for in this Treaty.

United States Government Comment: The United States Government supports Alternative K under Article 7.

Alternative VV ("TRIPS Model")

(1) Each Contracting Party shall accord to the national broadcasting organizations of other Contracting Parties treatment no less favorable than it accords to its own broadcasting organizations in respect of the application of the rights and the protection recognized expressly under this Treaty.

Supprimé : (2) . Each Contracting Party may choose to apply the obligation provided for in paragraph (1) only to the extent that the other Contracting Party applies Articles 8(2), 9 and 10 of this Treaty. If a Contracting Party avails itself of the possibility provided for in this paragraph, the Contracting Party shall notify this application to the Director General of the World Intellectual Property Organization (hereinafter WIPO).¶

United States Government Comment: The United States Government is not clear what the need for Article 7(2) is given the options provided under Article 7(1). We are also concerned about potential burdens on a Member State that this Article may create.

SUBSTANTIVE PROVISIONS

Article 8 *Protection of Broadcasts*

- (1) Broadcasting organizations shall enjoy the exclusive right of authorizing the simultaneous or deferred retransmission of their broadcasts by any means.
- (2) Contracting Parties may, instead of the exclusive rights of authorizing provided for in paragraph (1), establish adequate and effective legal protection for the broadcasting organizations against unauthorized retransmission by any means.

Supprimé :

Supprimé : (i)

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(ii) . the fixation of their broadcasts; and ¶
(iii) . the direct or indirect reproduction, in any manner or form, of fixations of their broadcasts.

Supprimé : . against unauthorized fixation, and against unauthorized reproduction of their broadcasts

United States Government Comment: The General Assemblies mandated the Member States: “to aim to agree and finalize on a signal-based approach.” Providing broadcast organizations with the exclusive rights of fixation and reproductions would extend beyond the Member State agreed mandate of the General Assemblies. For this reason, the United States Government suggests deletion of Article 8(1)(ii) and Article 8(1)(iii). Retransmissions are already protected under Article 8(1), and we do not see the need to prevent fixations made from authorized receipt of signals, as the harm comes when the fixation is transmitted, which is covered. Providing coverage for fixations and reproductions not only extends beyond the General Assembly’s mandate but also implicates personal uses that take place in the home such as recording a broadcast on videocassette or digital video recording and home copying.

Article 9 *Protection of the Pre-broadcast Signal*

Broadcasting organizations shall enjoy adequate and effective legal protection against any acts referred to in Articles 8 and 10 of this Treaty in relation to their signals prior to broadcasting.

Article 10 *Protection of Encryption and Information Relevant for Protection*

United States Government Comment: The United States Government supports the protection of technological measures used by broadcasting and cablecasting organizations but believes any such provision included under this Treaty should mimic the technological protection measures provisions from the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.

Supprimé : Contracting Parties shall provide adequate and effective legal protection against unauthorized

Supprimé : ¶

Supprimé : . (i) . decryption of an encrypted broadcast; ¶
. (ii) . manufacture, importation, sale or any other act that makes available a device or system capable of decrypting an encrypted broadcast; and ¶
. (iii) . removal or alteration of any electronic information relevant for the application of the protection of the broadcasting organizations.

Article 11 *Means of Implementation of the Protection*

The means by which Contracting Parties shall provide adequate and effective protection under the provisions of Article 8(2), 9 and 10 shall be a matter of the legislation of each Contracting Party, and shall include two or more of the following:

- (i) protection by means of the grant of a copyright or other specific right, such as a right related to copyright;

Supprimé : one

- (ii) protection by means of the law relating to unfair competition, or misappropriation;
- (iii) protection by means of a right of prohibition, or of providing for a prohibition, or of adequate measures to prevent unauthorized acts;
- (iv) protection by means of penal sanctions.

United States Government Comment: Each Member State should include at least one private right of action. This will reduce the government burden and provide the broadcasting/cablecasting organization with a remedy that does not require government action.

Article 12 Limitations and Exceptions

(1) Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of broadcasting organizations as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works, and the protection of related rights.

(2) Contracting Parties shall confine any limitations of or exceptions to the protection provided for in this Treaty to certain special cases which do not conflict with a normal exploitation of the broadcast and do not unreasonably prejudice the legitimate interests of the broadcasting organization.

United States Government Comment: The United States Government questions the necessity of Article 12(3) because it would appear that the permissive exceptions expressly set out under Article 12(3) would already be allowed under Articles 12(1) and 12(2). Indeed, Article 12(3) could even be read to limit the applicability of Articles 12(1) and 12(2).

Supprimé : (3) . Subject to the provisions in paragraph 2, and in accordance with paragraph 1, Contracting Parties may provide for limitations and exceptions to the protection provided in this Treaty for such purposes as private use, educational uses, scientific research, uses for the benefit of disabled persons, legal deposit requirements, reporting of current events, and use for public security and judicial purposes.

Article 13 Term of Protection

The term of protection to be granted to broadcasting organizations under this Treaty shall last, at least, until the end of a period of 20 years computed from the end of the year in which the broadcast took place.

United States Government Comment: The United States Government questions whether a 20-year term of protection is consistent with a signal-based approach.

United States Government Comment: The United States Government suggests deleting this Article. This Article provides a ban on formalities similar to the corresponding provision of the WIPO Performances and Phonograms Treaty, but broadcasts and broadcasting organizations are distinct from sound recordings and sound recording producers. We also note that the Rome Convention contains no such provision prohibiting formalities with respect to broadcasting organizations. In the United States, as in many other countries, our broadcasts and broadcasting organizations are licensed and regulated by the government under our telecommunications law and do have formal requirements, such as applying for licenses and invoking provisions of law regarding retransmission of their signals, that might be construed as formalities that could be forbidden by this Article.

Supprimé : Article 14 .
Formalities¶

¶ . The enjoyment and exercise of the rights provided for in this Treaty shall not be subject to any formality.

Supprimé : ¶

Article 15
Reservations

No reservations to this Treaty shall be permitted.

Article 16
Application in Time

- (1) Contracting Parties shall apply the provisions of Article 18 of the Berne Convention, *mutatis mutandis*, to the rights and the protection of broadcasting organizations provided for in this Treaty.
- (2) The protection provided for in this Treaty shall be without prejudice to any acts committed, agreements concluded or rights acquired before the entry into force of this Treaty for each Contracting Party.

Article 17
Provisions on Enforcement of Rights

- (1) Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty.
- (2) Contracting Parties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights or violation of any protection covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.

ADMINISTRATIVE AND FINAL CLAUSES

Unchanged (SCCR/15/2):

Article 18 – Assembly

Article 19 – International Bureau

Article 20 – Eligibility for Becoming Party to the Treaty

Article 21 – Rights and Obligations Under the Treaty

Article 22 – Signature of the Treaty

Article 23 – Entry into Force of the Treaty

Article 24 – Effective Date of Becoming Party to the Treaty

Article 25 – Denunciation of the Treaty

Article 26 – Languages of the Treaty

Article 27 – Depositary

[End of non-paper]